

<b>PRE-APPEAL BRIEF REQUEST FOR REVIEW</b>		Docket Number (Optional) MS1 - 542US	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first-class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.6(e)] via EFS Web on <u>Feb 17, 2006</u>  Signature <u>Pam M. Prellwitz</u>	Application Number 09/636,004	Filed 8/9/2000	
Typed or printed name <u>Pam M. Prellwitz</u>	First Named Inventor David del Val	Art Unit 2141	Examiner Quang N. Nguyen

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

- applicant/inventor.  
 assignee of record of the entire interest.  
 See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.  
 (Form PTO/SB/96)  
 attorney or agent of record. 46175  
 Registration number \_\_\_\_\_.

  
 Signature  
 Tim R. Wyckoff  
 Typed or printed name  
206-315-4001  
 Telephone number

- attorney or agent acting under 37 CFR 1.34.  
 Registration number if acting under 37 CFR 1.34 \_\_\_\_\_

2-17-2006  
 Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required.  
 Submit multiple forms if more than one signature is required, see below\*.

<input type="checkbox"/>	*Total of _____ forms are submitted.
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This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

1                   **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

2 Application Serial No. ....09/636,004  
3 Filing Date .....August 9, 2000  
4 Inventorship..... del Val et al.  
5 Assignee ..... Microsoft Corporation  
6 Group Art Unit .....2141  
7 Examiner ..... Nguyen, Quang N  
8 Attorney's Docket No. .... MS1-542US  
9 Title: FAST DYNAMIC MEASUREMENT OF CONNECTION BANDWIDTH

10                  **PRE-APPEAL BRIEF REQUEST FOR REVIEW**

11                  To: **Mail Stop AF**  
12                    Commissioner for Patents  
13                    P.O. Box 1450  
14                    Alexandria, VA 22313-1450

15                  From: Tim R. Wyckoff (Tel. 206.315.4001 x110; Fax 206.315.4004)  
16                    **Customer No. 22801**  
17                    Lee & Hayes PLLC  
18                    421 W Riverside Avenue, Suite 500  
19                    Spokane, WA 99201

20                  **REMARKS**

21                  The Pre-Appeal Panel (hereinafter "Panel") is respectfully requested to consider  
22                  this Request, which is submitted in accordance with the Pre-Appeal Brief Conference  
23                  Program rules. A summary of the rejected claims is provided in the Office Action dated  
24                  November 25, 2005, on pages 2-10 thereof (hereinafter "Office Action"). The Applicant  
25                  summarized the rejections of record in this Request as well. The Panel is requested to  
                      reconsider the rejections of record in view of the following comments and the arguments  
                      currently of record.

26                  **Rejection of Claims 7-9**

27                  Claims 7-9 stand rejected under 35 U.S.C. §103(a) as being unpatentable over  
28                  Bharali et al. (hereinafter "Bharali") in view of Payne et al. (hereinafter "Payne"). The  
29                  Panel is asked to reconsider this rejection.

1           The Office concedes that Bharali does not teach or suggest various limitations of  
2 **independent claim 7.** (See page 3, third paragraph, of the Office Action.) The Office  
3 references Payne to address the deficiencies of the Bharali patent. For the reasons that  
4 follow, Applicant respectfully submits that Payne does not cure the deficiencies of the  
5 Bharali patent.

6           Payne discloses a method and apparatus that monitors conditions of a signal  
7 propagation path. The method and apparatus function with both wireless and wired  
8 embodiments. Payne uses a connection monitor 40 that is capable of consulting with a  
9 modem 36 to deduce or establish a reduced data transfer rate as negotiated by a remote  
10 modem. (See column 8, lines 18-20.) Further disclosure related to how the connection  
11 monitor 40 deduces or establishes “a reduced data transfer rate as negotiated by a remote  
12 modem” is not provided in Payne.

13           The office maintains, on page 3 of the Office Action, last paragraph thereof, that  
14 the foregoing disclosure of Payne teaches “determining if the calculated bandwidth is  
15 outside a given range of believability for calculated bandwidth, if the calculated  
16 bandwidth is determined to be outside the given range of believability: disregarding the  
17 calculated bandwidth; and querying a modem of an entity about a bandwidth setting of  
18 the modem.” (See **independent claim 7.**) The Applicant fails to understand how the  
19 Office has reached this conclusion.

20           The Office’s argument is apparently that Payne consults a modem when  
21 performance is “less than desirable”, and that this is the same as determining whether  
22 calculated bandwidth is within a “range of believability for calculated bandwidth”  
23 However, this argument is without merit, since there is no teaching by Payne that a  
24 particular performance evaluation is not “believable.” The assumption in Payne is that  
25 “performance less than desirable” is true, and that data transfer rates need to be adjusted

1 as a result. In contrast, as is recited in **independent claim 7**, the instant claimed  
2 invention “*disregard[s]* the calculated bandwidth” when it is deemed as not being  
3 *believable*. This is done when a “calculated bandwidth is determined to be outside the  
4 *given range of believability*.” Payne makes no reference or suggestion to comparing a  
5 calculated bandwidth against a range of believability for calculated bandwidth.

6 Based on the foregoing comments, the Panel is respectfully requested to find that  
7 the current rejection of claims 7-9 is improper and therefore must be withdrawn.

8 **Rejection of Claims 19, 21-24, 27-29, 55 and 57**

9 Claims 19, 21-24, 27-29, 55 and 57 stand rejected under 35 U.S.C. §103(a) as  
10 being unpatentable over Bharali in view of Linzer. The Panel is asked to reconsider this  
11 rejection.

12 **Independent claim 19** recites “receiving a bandwidth value determined based  
13 upon measurements related to at least the pair of non-compressible packets, and  
14 consideration of a given range of believability related to calculated bandwidth.” The  
15 Office has conceded that Bharali does not teach or suggest considering “a given range of  
16 believability” in relation to a bandwidth calculation. (See Office Action, page 3, 3<sup>rd</sup> full  
17 paragraph.) Yet, in rejecting **claim 19**, the Office now states that Bharali does indeed  
18 teach the limitation. Applicant respectfully requests clarification of this discrepancy.

19 On page 8 of the Office Action, second paragraph, the Office states Bharali  
20 discloses “consideration of a given range of believability related to calculated bandwidth  
21 (here, the calculated transmission rate 10 bytes per second and 35 bytes per second could  
22 be used to implement a given range of believability related to the calculated bandwidth).”  
23 (Emphasis added.) In the foregoing, Office is saying Bharali does not teach an aspect of  
24 the claimed invention, but a given range of believability *could* be implemented. The  
25

1      Applicant asks how and under what circumstances? An assertion that something *could*  
2      *be implemented* is not legally sufficient basis for rejecting **independent claim 19**.

3           Bharali teaches a method and system that is capable of determining current  
4      network and bottleneck throughput. As is discussed in column 8, lines 25-33, a small  
5      packet and a large packet may be used to determine the throughput of a network. To  
6      summarize, Bharali computes the throughput based on a round trip time delay associated  
7      with the different sized packets. (See column 8, lines 42-45.) But saying that Bharali  
8      discloses or suggests considering “a given range of believability related to calculated  
9      bandwidth” when determining network throughput, as the Office asserts, is to do so  
10     without any support given by the disclosure of the patent. The Panel is respectfully  
11     requested to review the cited portions of Bharali that the Office asserts are relevant to the  
12     claimed invention.

13           Based on the foregoing comments, the Panel is respectfully requested to find that  
14     the current rejection of claims 19, 21-24, 27-29, 55 and 57 is improper and therefore must  
15     be withdrawn.

16           **Rejection of Claims 58-63**

17           Claims 58-63 stand rejected under 35 U.S.C. §103(a) as being unpatentable over  
18     Bharali in view of Payne, and further in view of Wang (Patent No. 6,118,817). The Panel  
19     is asked to reconsider this rejection.

20           For the same reasons discussed in this document, regarding the Payne patent,  
21     Applicant submits that the subject matter of **independent claim 58** that recites  
22     “determining if the calculated bandwidth is outside a given range of believability for  
23     calculated bandwidth” is not rendered obvious by the combination of Bharali, Payne and  
24     Wang. The Panel is requested to refer herein to lines 6-15 of page 2 and lines 1-3 of page  
25     3.

1           The Office relies upon Wang to teach the subject matter of **claim 58** that recites  
2 “setting a bandwidth to a low-believability threshold...; and setting a bandwidth to a high-  
3 believability threshold...” The Office specifically points to column 15, lines 10-60, in the  
4 rejection of the claim. The Office asserts that the disclosure relating to increasing or  
5 reducing a number of frames produced (frame rate) by a frame rate controller 120 is the  
6 same thing as “setting a bandwidth” to either a low or high believability threshold. The  
7 Applicant disagrees with the Office understanding of Wang.

8           Frame rate, or frame frequency, is the measurement of how quickly an imaging  
9 device produces unique consecutive images called frames. How quickly the device  
10 produces the frames is based on available bandwidth. But producing frames is not the  
11 same thing as “setting a bandwidth.” The frame rate controller 120 merely *determines* a  
12 bandwidth level and then sets the frame rate accordingly. (See col.15, lines 37-41.)

13 **Conclusion**

14           In accordance with the above, the Panel is respectfully requested to reconsider and  
15 withdraw the rejections of the claims. The pending claims are in condition for allowance.  
16 Applicant respectfully requests reconsideration and prompt allowance of the subject  
17 application.

18  
19           Respectfully Submitted,

20 Date: 2-17-2006

21 By:   
22 Tim R. Wyckoff  
Lee & Hayes, PLLC  
Reg. No. 46,175  
23 (206) 315-4001 ext. 110  
24  
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